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By MORRISON I. SWIFT

It is not the name that constitutes an institution, but what that institution does. The two functions of the British Lords which have led to the popular revolt against that body are the fortification of private privilege and the nullification of the people's will. While the American House of Lords is a somewhat different creation from its British prototype, and more elusive through its complexity, it performs the same functions even more perfectly. It is a composite body, formed of the Senate and the Supreme Court. Each of these branches possesses veto power over legislation, for the Senate can prevent legislation, while the Supreme Court can pronounce it unconstitutional. In England the Lords, by protecting a number of ancient privileges and defeating modern laws, render it impossible for the people to obtain their rights: in America the Lords are busy establishing equivalent privileges for a favored class and are thus building up that class into permanence. In this country we are retrograding by doing what the democracy of England is undoing.

Looking about for the most vulnerable part of the Government the rich man readily perceived it to be the Senate, which he proceeded to capture. It is a small body with a six-year term of office, election to which is by a method exceedingly susceptible to purchase and influence. A seat in the Senate is easily bought without the evidences of purchase. The rich man merely contributes funds to elect members of the state legislature, a stainless act; what more natural than that they should gratefully remember his kindness and elect him United States Senator afterwards?

The Senate's complexion tells the result. Twenty-one of the senators are very conservatively estimated to be worth an aggregate of $237,000,000, the ten richest of them owning $185,000,000 of it. Of the rest a number of fortunes pass the million dollar line, and all or nearly all the others stand high in the grade of "well off."

Senator Flint, of California, gave as his reason for withdrawal from political life his inability to afford the $50,000 to $75,000 that the senatorial campaign for re-election would cost him, yet Flint is supposed to be worth $500,000. If a senator is rich enough to elect himself he can be relied on to devote himself to the rich interests; but if no such senator is in the field these interests know the game well enough to provide funds to elect men expressly to take care of their affairs in the upper chamber.

It thus happens that the Senate represents wealth vastly out of proportion to the total of individual senators' holdings. The very rich senators represent all the wealth of all those interested in the same commercial operations that they are. Aldrich is a Standard Oil connection, Oliver belongs to Pittsburg Steel, Elkins was a sentinel of railroads and mines, Du Pont is in gunpowder, a member of the great concern that sells powder to the Government, Guggenheim is in the Senate from the Principality of Guggenheim, seven brothers whose smelters and absorptions of silver, copper, gold, coal and real estate in the States, British Columbia and Alaska are believed to bear a value of $500,000,000. Practically all fields of wealth are in one or another way represented by senators. Some are lawyers who made their money working for the corporations and trusts.

It is impossible to suppose that such a collection of men work for the people's good; at least they do so only in the Pickwickian sense in which President Baer as viceroy of Providence works for the benefit of the coal miners. Inevitably, while so composed, the Senate is a class chamber openly or surreptitiously opposed to popular welfare.

While senatorial election by direct popular vote, in favor of which many States have already declared, would improve the situation, it would not be a remedy; wealthy men would still enjoy an immense advantage in the race because money is so powerful a factor in all elections, including those of persons elected directly by the people. Although direct election may cost the senator much more than indirect, what does the possible difference amount to for our very rich men? It has no significance when weighed against the value to rich men of keeping the Senate in their possession; so that while a few poor men may be introduced by the change the body as a whole will remain a rich men's conclave.

Besides there are other evils inherent in the Senate's authority which render it a fit instrument for greedy interests. It divides

and dissipates responsibility for legislation as two chambers always do, opening the way to all sorts of legislative crookedness. Where responsibility for laws can not be traced and definitely located so that the evil doers can be held to strict account, the people have no safeguard and the predatory powers can get what they want. This will continue so while two legislative branches exist. One of them can always allege that the other thwarted its purpose—how are the people to know the real state of the case? The intricate interplay of the two houses, the complexity of the legislative machinery, leave them in irremediable confusion.

Moreover, the existence of two chambers diminishes the dignity of both and deprives their members of stimulus to do good work, representatives know that their efforts will be tinkered and doctored if not emasculated by the Senate, why therefore expend labor merely to see it quashed? Under these circumstances statesmen cannot be produced, nor will men much above mediocrity go to Congress to wear out their forces in useless attrition.

The real remedy is alteration of the Senate into a consultive body without power to retard or prevent legislation or to enforce changes in it, leaving all actual enactment of laws to the House of Representatives. Instead of lessening the Senate's dignity, its prestige would thereby be greatly enhanced, for not only would its function be a paramount one but men of several grades higher caliber than now serve in it would then gladly do so. Their function would be primarily preparation of the best possible legislation and its recommendation to the House for passage, and since the sole path to honor and distinction for the senators would lie through the perfection of the legislation devised and its advantage to the people, their work would be in the highest degree disinterested and would invite the highest type of men. The public would listen to the advice of such a group and would hold the House sharply accountable for disregarding its counsel except for still more intelligent and public spirited reasons. Thus the House would be put on its mettle, bringing out its best powers, elevating it in public esteem and drawing to it men much superior to its present personnel.

To this extent the evils of divided legislative responsibility would be overcome. Various cities have already taken this course to cure the same mischief. They have discarded the bicameral idea by abolishing one branch, or even both, of the city legislature to focalize responsibility. It is difficult to see why the national Gov-

ernment, suffering from similar calamities from the same cause, should adhere to an archaic machinery which the cities are rejecting as unworkable.

But we have to face another encroachment in the same field, namely that of the Supreme Court. It is curious how the myth of the separation of the powers of government—executive, legislative and judicial—has imposed on us, and startling what havoc it works. The Supreme Court has gone over into the field of legislation and made itself the leading legislative power under the guise of merely judging. Lines of possible legislative action are limited in number: grant one body authority to command another what not to do, and it is really empowered to order what it shall do. Such is the attitude assumed toward Congress by the Supreme Court, which in all great matters guides, coerces and drives Congress by a series of prohibitions. By building the banks of a river you determine the path of its flow. The right of continuous exercise of the veto on legislation is nothing less than shaping the channel in which all legislation must flow.

The theory reposed on to justify this is that the Court in so acting is merely adjudicating between two laws, one higher (the constitution), the other lower (the statute), to preserve the lower from infringing on the higher. But it remains that whatever power exercises this discrimination is legislative. A perusal of Supreme Court interpretations will show that in most of them, with the same or greater fidelity to the constitution, other decisions might have been made; that in nearly all Supreme Court rulings involving the constitution there is either a choice between two or more equally constitutional courses, or that the Court elected the less rational and constitutional line. There is a broad belt of permissive interpretation, and within this belt all decisions are very distinctly legislative. It covers much of the most important field of lawmaking. The almost constant disagreement of the supreme justices among themselves is unquestionable proof of this, matters of the utmost national moment sometimes being settled by a majority of one in that Court, a nearly equal minority holding the majority decree to be unconstitutional. This division cancels the virtue of the Court and points to the truth that probably both courses are constitutional, and that it is a matter for the legislature and not the Court to decide; or it indicates that many of the Court's decisions are in point of fact unconstitutional, and exhibits the Court as an incompetent constitutional guide.

But the Court, not only by grave mistakes but by reversing itself, has gone even farther than this in proving that its decrees are the mere fallible opinions and even legalized guesses of a group of lawyers, emanating from no superior insight into the constitution. In 1870 by a vote of 5 to 3 the Court declared an act of Congress invalid; in 1871 the Court reversed itself on this decision; in 1884 it confirmed this reversal, thereby again annulling its original decision of 1870, by a vote of 8 to 1. *Eight out of nine justices here declared that the Supreme Court had interpreted the constitution unconstitutionally in 1870.* What reason is there to think that most of its interpretations are not similarly unconstitutional, undeclared so because the judges do not become wise enough to see it, or, perhaps, are not honest or courageous enough to admit it?

Now since constitutional interpretation is a paramount function, being the highest and most vital legislation, nothing equals the importance of the choice of the body to whom this function shall be entrusted; accident is the last thing that should govern its choice; and since the nature of the interpretation made will depend on the psychology of the interpreter, it is this psychology that must determine the selection. Upon most points the constitution is formless and inchoate, so that a declaration of what it is, while alleged to be interpretation of a fixed reality, is in fact pure invention and creation. Whether their principle of decision is legality or public welfare, the judges therefore in truth merely utter themselves and yoke their personal dicta on to the people as fundamental law. The problem then is whether nine judges are wiser than the nation or not. Were they the wisest nine men in the world would they be fit for this task?

They are hardly the wisest. Mostly trust-practice graduates, or lawyers who have grown up under the Court fetish of the sanctity of wealth against man, selected by political motive, affiliated by all ties with regnant wealth, unelected, irrecallable, unimpeachable, remote as the birds of the air from the people, accustomed by legal habit to consider the misty many a mob whose erratic proclivities judges are ordained to restrain, and to regard the prevailing few as the nation's weight and worth, they are the least qualified of all citizens to manufacture the nation's constitution.

Where these judges profess to adjudicate constitutional questions upon rigidly legal principles, since the field of choice open is so wide, their selection is ultimately determined by the kind of

doctrine they personally believe to be best to rivet upon the people; so when analyzed to the bottom it is the personal psychic bias of these judges which decides what they will pronounce to be the constitution, or, in plain words, what constitution they will create. And that personal bias is by no means always shaped by their conviction of what is public well-being, but often by their instinct of what will most benefit the social class to which by self-interest they belong.

This shows us that while the supreme judges are the least competent to interpret the constitution, the people alone are equal to that function. A democracy in which the people do not decide the meaning of their fundamental instruments is but a form and a sham. They may not exercise that highest of offices directly, but if for convenience they do so indirectly it must be through a body over which they have full and swift control, one accurately reflecting them, elected directly and often by them, recallable at all times by them. No government organ answers even partially to these demands except the House of Representatives.

It is a function, then, to be operated through the House because by frequent early expiration of a Congressman's term he most of all public men can be made responsive to public will, and because the supreme judge, immune from popular authority by freedom from election and by life-tenure, can almost as intelligently legislate for Mars as for the earth. But the ascription of fitness for this purpose to the House is but a relative truth until that body is made the single responsible representative chamber.

To describe the Supreme Court as I have done is to say that a body elaborately specialized to do one kind of work is naturally pre-eminently unfitted to do a cardinally different kind of work, calling for another form of ability and training. The judges, devoid of lawful sanction or constructive discipline for legislation, have usurped the legislative office. A good lawmaker must place popular well-being first, must have a large mental grasp of the principles that will advance it, and must be able to contrive measures for its achievement. Has the supreme judge these attributes? Trained to burrow through mountains of past and decayed decisions, to tinker with moribund precedents, to reach an end only through labored carpentering of second-hand and ill-fitting material, his originative faculty is atrophied or killed. By the law of his office as judge he must declare that in construing the constitution

he only applies and adjusts existing laws, the constitution being primary, the statutes secondary, and that he banishes all considerations of popular well-being as extra-judicial and irrelevant. In so doing he strips himself of the first attribute of a good legislator, and thus denuded he proceeds to act as the supreme legislator. Whether he takes himself seriously in this, and legislates under the hallucination that he is judging, or not, he will legislate viciously.

Another unpalatable truth follows. The high-sounding maxim of the Supreme Court that this is a government of laws, not of men, because the Court can invalidate unconstitutional acts of Congress, is seen to be a mere myth. Yet there is no plea on which the Court more constantly relies to keep the people quiescent under its stream of vetoes of their progressive legislation, than on this empty fiction. Supreme Court power to negative laws distasteful to theories of the constitution spun from the Court's own bowels makes this a government of men, not of laws. The men are the nine judges. They do not seem averse to men being the supreme rulers of the United States, if behind the mask of the constitution they are the men.

And this brings us to a fact of great consequence. The constitution confers no authority on the Supreme Court to exercise the function of interpreter. Nowhere in the constitution is the Court empowered to annul statutes which it deems unconstitutional. The power belongs to it purely by appropriation, which is only saying that it does not belong to it at all. It will not do in explanation of its omission to say that it is an implied or intended power, or, as Mr. Bryce does, that it is "a duty rather than a power," because the writers of the constitution enumerated with extreme explicitness the duties of that Court, and to argue that they omitted altogether the most important one or left it to inference is to nullify the value of the document as a guide. If the constitution said nothing about the President's veto, thereby evidently granting him none, would it be his inferential duty to exercise an absolute veto at his discretion? The cases are parallel. Because the constitution by silence expressly withholds the veto power over legislation from the Supreme Court, the Court has decided that in so doing the constitution grants it an absolute veto.

There is another proof, quite conclusive in itself, that the Supreme Court has acquired this office not by constitutional right but by bald assumption of it, which is that neither the earlier Presi-

dents nor Congresses conceded it. Mr. Bryce says in "The American Commonwealth" (i,375) that "at one time the Presidents claimed the much wider right of being, except in questions of pure private law, generally and *prima facie* entitled to interpret the constitution for themselves, and to act on their own interpretation, even when it ran counter to that delivered by the Supreme Court... Majorities in Congress have more than once claimed for themselves the same independence." Their later recession from this position shows nothing more than that the Supreme Court prevailed against general conviction in establishing a habit.

Hamilton himself, an ardent advocate of reposing this power in the judges, is reduced to the extremity of arguing that the constitution does so because "it is not to be collected from any particular provisions in the constitution" that the power is located elsewhere. (Federalist, No. 78). Hamilton's defective perspicacity on this subject is seen from his declaration that "the judiciary is, beyond comparison, the weakest of the three departments of power," and his quoting Montesquieu that "of the three powers above mentioned, the Judiciary is next to nothing." To us it has become clear that whatever body controls the absolute veto is the sovereign government force.

It is now one of the commonplaces of the subject that the Supreme Court, by its use of interpretation and veto, is continually constructing a new constitution. That is to say it is making laws, and laws that are the most fundamental. Having arrogated this power it retains it by the pure fiction that it is merely compelling the statutes to subordinate themselves to a fixed and self-evident constitution. The self-evidence always coincides with the way the Court is minded to look at it.

The practical outcome of this power at the present time is this. An economic process is in full swing by which a few are absorbing the great mass of the nation's wealth, reducing the general population to a state of dependence that is practical pauperism. When a State attempts effective measures to stem the process, the Supreme Court applies its veto either on the ground that the State has usurped a Federal function or that its act is confiscatory; when the Federal Government undertakes the same thing, its acts are annulled by the Court as either confiscatory or infringements on the constitutional rights of the States. Nine men, wholly without constitutional or legal authority to act in the case, are handing over

the nation's wealth to a few persons whose only final claim to it is the personal opinion of these nine men, with all that this means in either permanent popular servitude or revolution.

These nine legal gentlemen may act under the honest conviction that a few persons should own the country. The questions then are how did they get such subversive convictions, and how did they reach a post where they could invert the principles of democracy and apply their deforming doctrines to life? The conspicuous lawyers become so by defending corporations; the foundation of such defence is that corporations have a right without limit to everything they can get; thus the convictions of judges are formed, for it is usually these conspicuous lawyers that are promoted to the high judgeships. Their ascension to the Supreme Bench is through the door of the body that represents concentrated wealth, the Senate. No appointee of the President to the Supreme Bench can occupy that office unless confirmed by the Senate, a fact that influences the President in his selections. Moreover, the senators use their weight with him directly to have judges of their complexion named, and scandals have sometimes ensued from the subsequent relation of these senators to the Supreme Court which they helped to form. By this process the Supreme Court can be stacked with justices holding oligarchic and plutocratic convictions.

The opinion of five of these justices determines the Court's decision. It thus happens that the destiny of a nation of ninety millions is chiseled by the mental temper of five practically irresponsible men. The people have no control over them. They are as free from responsibility as an absolute autocrat, for while he governs despotically according to his psychic bias, they mold the governing constitution autocratically according to their psychic bias. Executive, Senators, and Representatives, are responsible because their tenure of office dies; these five sovereigns hold office during good behavior, which always means for life, which elevates them above influence from any popular source, and surrenders them to the untrammeled control of their own preferences. To efface democracy and achieve a constitutional plutocracy without a perceptible revolutionary ripple, the rich who seat themselves in the Senate need only secure the appointment of five supreme judges with the proper bent of mind for their purpose and the work is done.

Since the Supreme Court veto on legislation is an usurped right, no change in the constitution is required to deprive the

Court of its use. Congress may simply refuse to recognize Court annulment of its acts, or, this failing, may deprive the Court of jurisdiction over all cases where the constitution is involved. In view of the people's submission to the Court's unlawful claim to supremacy over Congress, it would seem as if the constitution itself could have been read through attentively by very few people since its adoption. There is a clause in it which says: "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before-mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, *with such exceptions and under such regulations as the Congress shall make.*" (Art. III, Sect. 2, Par. 2.)

This constitutionally empowers Congress to expel the Supreme Court from nearly the whole field it now claims to control exclusively by direct and absolute constitutional mandate. It can relegate the Court to impotence by a vote. The framers ordained it so in language too lucid for even the subtlest legal mind to pervert. If this power is not congressional supremacy over the Court there could be none. The keen framers of the instrument said in it to Congress, "If the Court arrogates power, cut down its jurisdiction to check it." It could not in the same breath say to the Court, "If Congress passes laws which you think unconstitutional, veto them"; for these two utterances cancel each other and stultify the document. And if, in the face of the quoted clause, the Court can extort the dogma of its supremacy from the "spirit of the constitution," it can also declare an act of Congress curtailing its jurisdiction in express accordance with the constitution, null and void, thereby reducing the constitution to a farce.

That this question should be brought to an early issue is indicated by a current circumstance of great moment. A new method of curtailing the powers of Congress by means of the judiciary is now being contrived by trust attorneys. Hitherto the judicial process has been wherever possible to declare Congress constitutionally prohibited from lines of action destructive of the absolutism of wealth. But even this emasculation is insufficient, for there remain some powers conferred on Congress in words so plain that they cannot be questioned, and these must be undermined. It is to be done by judicial attack on the *motive* of Congress in their exercise. This will enable the Supreme Court *to veto any act whatever* of Congress, for the right to veto will rest on the mere

opinion of the Court that the motive prompting the act was improper. This further and final Court usurpation of legislative function will, if consummated, be the logical climax of its progressive absorption of the governing power.

James M. Beck, who is a legal adviser of the Trusts, defines and defends this new expansion of judicial power in a late "Harvard Law Review," in the following way:

"The very serious question suggests itself as to whether it is reasonably possible for the judiciary to determine whether a Federal power has been exercised for a Federal end or for some ulterior purpose. Undoubtedly this task, if ever assumed by the judiciary, would be even more delicate and embarrassing than the ordinary exercise of the power of adjudging a statute unconstitutional. . . . Nevertheless, unless our dual system of government [State and Federal] is to be subverted the Supreme Court must return to the doctrine of Marshall that 'should Congress, under the pretext of exercising its powers, pass laws for the accomplishment of objects not entrusted to the Government, it would become the painful duty of this tribunal . . . . to say that such an act was not the law of the land.'

"To this conclusion, it is the belief of the writer, the Court will, indeed must, come."

Marshall, in making over the constitution according to his personal fancies and desires, laid down the above proposition. It now proves to be an invention which, if established, will render the aggregations of wealth impregnable.

In depriving the Supreme Court of its unconstitutional veto, it might be wise for Congress to experimentally endow the Court by statute with a temporary veto of one year from the time of its passage, upon such legislation as it should deem unconstitutional, in order to give its legal criticisms time to be weighed, when if re-enacted it should become law. Provided the Senate were made a consultive body as proposed, the delay of final passage might perhaps be advantageously extended until after the election of the next House, when the people would have registered their mandate on the subject by their votes. In this way every re-election of the House would become an interpretation of the constitution by the people themselves. All that is believed good in Court action would then be retained and submitted to a fair trial.

With the vetoes of the Senate and Court banished, the prime end of making the House a responsible legislative body would be attained. A House thus closely connected with the people could be controlled by the free use of the referendum, initiative and recall. It would then be possible for the first time under the American system to test the virtue of genuine democratic representative government. Greater success would be probable if half of the consultive Senate were elected from the nation at large by the proportional method of voting. A body containing men of eminent genius to construct measures of the greatest benefit to the public would thus be obtained, while the Supreme Court would furnish expert advice on the strictly legal aspects of laws.

With these instruments the best forces of the nation would be brought into play, and the intelligent will of the people, relieved of archaic, perverting and irrational artifices to impede it, would achieve its ends with reasonable speed, fulfilling the true purposes of a democracy.

H. J. F. H.
2/16/11